

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSE M. BERNARDO and ARACELI B.
BERNARDO,

Plaintiffs,

v.

U.S. BANK NATIONAL ASSOCIATION,

Defendant.

No. C 10-04785 CW

ORDER GRANTING
DEFENDANT'S
MOTION TO DISMISS
AND DENYING AS
MOOT PLAINTIFFS'
MOTION FOR A
PRELIMINARY
INJUNCTION
(Docket Nos. 6
and 2)

Pro se Plaintiffs Jose M. Bernardo and Araceli B. Bernardo bring this foreclosure-related lawsuit against Defendant U.S. Bank National Association, as successor in interest to the Federal Deposit Insurance Corporation as Receiver for Downey Savings and Loan Association, F.A. Plaintiffs seek a preliminary injunction to enjoin U.S. Bank from foreclosing on property located at 5015 Shapleigh Court, in Dublin, California. U.S. Bank moves to dismiss and strike Plaintiffs' complaint. Plaintiffs oppose the motion. The motions were taken under submission on the papers. Having considered the papers submitted by the parties, the Court GRANTS U.S. Bank's motion to dismiss and DENIES as moot Plaintiffs' motion for a preliminary injunction.

BACKGROUND

Plaintiffs' complaint is composed, for the most part, of general allegations about the mortgage industry.¹ The only

¹ Plaintiffs' complaint is largely identical to the pleadings filed in Torres v. Wells Fargo Bank, Case No. C 10-4761 CW; Padilla v. One West Bank, Case No. C 10-4080 CW; Blackwell v. Wells Fargo Home Mortgage, Case No. C 10-4917 JF; and Bennett v. Suntrust

1 specific allegation is that Plaintiffs "entered into a consumer
2 contract for the refinance of a primary residence located at 5015
3 Shapleigh Ct Dublin CA 94568." Compl. 1. The complaint then
4 alleges that "Defendants, acting in concert and collusion with
5 others, induced Petitioner to enter into a predatory loan agreement
6 with Defendant."² Id. at 2. The agreement, which Plaintiffs
7 executed on or about April 23, 2007, was for a \$1,103,000 loan.
8 See Compl. 5; U.S. Bank's Request for Judicial Notice (RJN), Ex. A,
9 1.³ Plaintiffs do not plead U.S. Bank's or Downey Savings's role
10 in this loan or the violations they allege in their complaint.
11 However, on or about September 8, 2010, U.S. Bank purchased the
12 Shapleigh Court property at a foreclosure sale. RJN, Ex. A, 1.

13 Plaintiffs filed this lawsuit on October 22, 2010. In the
14 "Causes of Action" section of their complaint, Plaintiffs assert
15 the following claims: (1) breach of fiduciary duty; (2) negligence
16 and negligence per se; (3) fraud; (4) breach of the covenant of
17 good faith and fair dealing; (5) violation of the Truth in Lending
18 Act (TILA), 15 U.S.C. §§ 1601 et seq.; and (6) intentional
19 infliction of emotional distress. Plaintiffs seek damages in the
20 amount of \$3,718,617.82, punitive damages in the amount of
21 \$11,156,015.46, rescission of the loan contract, quiet title to the

22 _____
23 Mortgage, Inc., Case No. 10-3375 JF.

24 ² Although Plaintiffs' allegations speak of "Defendants," they
25 name only one Defendant, U.S. Bank National Association.

26 ³ Plaintiffs do not oppose U.S. Bank's request for judicial
27 notice of documents recorded in the Alameda County Clerk-Recorder's
28 Office that are related to their mortgage. Accordingly, the Court
GRANTS U.S. Bank's request.

1 Shapleigh Court property and an injunction enjoining U.S. Bank from
2 engaging in fraudulent, deceptive, predatory and negligent acts.⁴

3 LEGAL STANDARD

4 A complaint must contain a "short and plain statement of the
5 claim showing that the pleader is entitled to relief." Fed. R.
6 Civ. P. 8(a). When considering a motion to dismiss under Rule
7 12(b)(6) for failure to state a claim, dismissal is appropriate
8 only when the complaint does not give the defendant fair notice of
9 a legally cognizable claim and the grounds on which it rests.
10 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In
11 considering whether the complaint is sufficient to state a claim,
12 the court will take all material allegations as true and construe
13 them in the light most favorable to the plaintiff. NL Indus., Inc.
14 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this
15 principle is inapplicable to legal conclusions; "threadbare
16 recitals of the elements of a cause of action, supported by mere
17 conclusory statements," are not taken as true. Ashcroft v. Iqbal,
18 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550 U.S. at 555).

19 When granting a motion to dismiss, the court is generally
20 required to grant the plaintiff leave to amend, even if no request
21 to amend the pleading was made, unless amendment would be futile.
22 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
23 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment

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25 ⁴ Plaintiffs allude to other statutes in the "General
26 Allegations" section of their complaint and offer a "Statement of
27 Claim" section that refers to a criminal conspiracy. However, only
28 these six causes of action are listed after the heading, "Causes of
Action."

1 would be futile, the court examines whether the complaint could be
2 amended to cure the defect requiring dismissal "without
3 contradicting any of the allegations of [the] original complaint."
4 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).

5 DISCUSSION

6 Plaintiffs' opposition is a form response,⁵ largely identical
7 to that filed in Torres and Padilla, and fails to address arguments
8 raised in U.S. Bank's motion to dismiss and strike. Their
9 opposition, like their complaint, does not explain U.S. Bank's role
10 with respect to their loan. However, in their opposition,
11 Plaintiffs address a claim for violations of the Real Estate
12 Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601, et seq.
13 Although the "Causes of Action" section of their complaint does not
14 contain such a claim, the Court considers and dismisses it below.

15 U.S. Bank offers arguments concerning what it believes to be
16 claims for its lack of "standing," "criminal conspiracy and theft"
17 and unjust enrichment, which appear in the "Statement of Claim"
18 section of Plaintiffs' complaint. Plaintiffs do not plead such
19 claims in their "Causes of Action" section, nor do they argue in
20 their opposition that they have such claims. Even if Plaintiffs
21 intended to bring such claims, relief cannot be granted based on
22 them.

23 I. Set Aside of Foreclosure Sale

24 U.S. Bank argues that Plaintiffs' entire complaint must be

25
26 ⁵ Attached to Plaintiffs' "Response" is a set of instructions,
27 which instruct them to "[l]ook for anything that has been
28 highlighted in yellow and add the information then un-highlight
it." Pls.' Response 27.

1 dismissed because they fail to allege tender of their indebtedness.
2 This argument sweeps too broadly.

3 To the extent Plaintiffs challenge the September 2010 sale of
4 the Shapleigh Court property, they do not offer a basis to set it
5 aside. Further, a plaintiff seeking to set aside a foreclosure
6 sale must first allege tender of the amount of the secured
7 indebtedness. Abdallah v. United Sav. Bank, 43 Cal. App. 4th 1101,
8 1109 (1996) (citing FPCI RE-HAB 01 v. E & G Investments, Ltd., 207
9 Cal. App. 3d 1018, 1021-22 (1989)); Smith v. Wachovia, 2009 WL
10 1948829, at *3 (N.D. Cal.). Without pleading tender or the ability
11 to offer tender, a plaintiff cannot state a cause of action to set
12 aside a foreclosure sale. Karlsen v. Am. Sav. & Loan Ass'n, 15
13 Cal. App. 3d 112, 117 (1971) (citing Copsey v. Sacramento Bank, 133
14 Cal. 659, 662 (1901)); Smith, 2009 WL 1948829, at *3 (citing
15 Karlsen).

16 Plaintiffs have not alleged facts that warrant setting aside
17 the foreclosure sale. Even if they had, Plaintiffs do not allege
18 tender or the current ability to offer tender. Thus, to the extent
19 that they seek to set aside the foreclosure sale, Plaintiffs offer
20 no basis to do so. This does not, however, warrant dismissal of
21 their entire complaint.

22 II. Real Estate Settlement Procedures Act

23 Although Plaintiffs do not include a claim for violation of
24 RESPA, 12 U.S.C. §§ 2601 et seq., in the section of the complaint
25 entitled, "Causes of Action," the Court addresses it because
26 Plaintiffs mention the statute several times in the "General
27 Allegations" section of their complaint and suggest in their
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1 opposition that they intended to bring such a claim.

2 Plaintiffs do not make clear under which section of RESPA they
3 bring their claim. However, they allege that certain disclosures
4 were not made at the time they executed their loan agreement.
5 Compl. 17-18. These purported non-disclosures appear to implicate
6 12 U.S.C. § 2605(a), which requires each "person who makes a
7 federally related mortgage loan" to "disclose to each person who
8 applies for the loan, at the time of application for the loan,
9 whether the servicing of the loan may be assigned, sold, or
10 transferred to any other person at any time while the loan is
11 outstanding." Plaintiffs do not allege, however, that U.S. Bank
12 provided them with such a loan. Further, the statute of
13 limitations for § 2605 claims is three years.⁶ 12 U.S.C. § 2614.
14 Plaintiffs apparently executed their loan agreement in April 2007
15 and, thus, they were required to bring a § 2605 claim by April
16 2010. They did not do so and, accordingly, their § 2605 claim is
17 time-barred.

18 Plaintiffs suggest that fraudulent conduct entitles them to
19 relief from the statute of limitations based on the doctrine of
20 equitable tolling. This argument appears to implicate the doctrine
21 of equitable estoppel, not equitable tolling. Equitable tolling
22 applies when there is "excusable delay by the plaintiff." Johnson
23 v. Henderson, 314 F.3d 409, 414 (9th Cir. 2002). "Equitable
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25 ⁶ U.S. Bank incorrectly argues that all RESPA claims are
26 subject to a one-year statute of limitations; such a limitations
27 period applies only to claims under 12 U.S.C. §§ 2607 and 2608. 12
28 U.S.C. § 2614. Plaintiffs' allegations do not suggest that their
RESPA claim arises under § 2607 or § 2608.

1 estoppel, on the other hand, focuses primarily on the actions taken
2 by the defendant in preventing a plaintiff from filing suit." Id.
3 at 414 (citation and internal quotation marks omitted; emphasis in
4 original). Plaintiffs have not alleged that U.S. Bank was their
5 lender or facts to suggest that it prevented them from filing suit.
6 Thus, Plaintiffs do not support relief from the statute of
7 limitations under the doctrine of equitable estoppel.

8 Plaintiffs have not alleged facts to suggest that U.S. Bank
9 was its lender and violated § 2605. Further, this claim appears to
10 be time-barred. Accordingly, Plaintiffs' RESPA claim is dismissed.
11 Plaintiffs are granted leave to amend to plead facts that support a
12 claim under § 2605 that is not barred by the three-year statute of
13 limitations.

14 III. Quiet Title

15 Plaintiffs ask that title in the Shapleigh Court property be
16 quieted in their favor. To state a claim for quiet title under
17 California law, a plaintiff's complaint must contain: (1) a
18 description of the property; (2) the title of the plaintiff and its
19 basis; (3) the adverse claims to that title; (4) the date as of
20 which the determination is sought; and (5) a prayer for relief of
21 quiet title. Cal. Civ. Proc. Code § 761.020.

22 As noted above, U.S. Bank apparently purchased the Shapleigh
23 Court property in September 2010 and currently holds title to it.
24 Plaintiffs fail to plead facts that tend to show that they have a
25 colorable claim to the property. Plaintiffs appear to assert that
26 they still hold title because no lender ever presented them with
27 the original promissory note and, as a result, the foreclosure sale
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1 was improper. However, in California, there is no requirement that
2 a trustee produce the original promissory note prior to a non-
3 judicial foreclosure sale. See, e.g., Pantoja v. Countrywide Home
4 Loans, Inc., 640 F. Supp. 2d 1177, 1186 (N.D. Cal. 2009); Smith v.
5 Wachovia, 2009 WL 1948829, at *3 (N.D. Cal.); Neal v. Juarez, 2007
6 WL 2140640, *8 (S.D. Cal.). California Civil Code sections 2924
7 through 2924k "provide a comprehensive framework for the regulation
8 of a non-judicial foreclosure sale pursuant to a power of sale
9 contained in a deed of trust." Knapp v. Doherty, 123 Cal. App. 4th
10 76, 86 (2004) (quoting Moeller v. Lien, 25 Cal. App. 4th 822, 830
11 (1994)). Knapp explains the non-judicial foreclosure process as
12 follows:

13 Upon default by the trustor [under a deed of trust
14 containing a power of sale], the beneficiary may declare
15 a default and proceed with a nonjudicial foreclosure
16 sale. The foreclosure process is commenced by the
17 recording of a notice of default and election to sell by
18 the trustee. After the notice of default is recorded,
19 the trustee must wait three calendar months before
20 proceeding with the sale. After the 3-month period has
21 elapsed, a notice of sale must be published, posted and
22 mailed 20 days before the sale and recorded 14 days
23 before the sale.

19 Knapp, 123 Cal. App. 4th at 86 (citation omitted). "A properly
20 conducted nonjudicial foreclosure sale constitutes a final
21 adjudication of the rights of the borrower and lender." Id. at 87.
22 Plaintiffs have not alleged actionable irregularities in the non-
23 judicial foreclosure sale. Thus, it appears that the September
24 2010 sale resolved ownership rights to the property.

25 Furthermore, as already explained, Plaintiffs have not alleged
26 tender or the current ability to offer tender of the amount of
27 their indebtedness. Thus, they cannot state a claim to quiet
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1 title. See, e.g., Kelley v. Mortg. Elec. Registration Sys., Inc.,
2 642 F. Supp. 2d 1048, 1057 (N.D. Cal. 2009).

3 Plaintiffs have not alleged facts tending to show that they
4 have a colorable claim of title, nor do they plead that they have
5 satisfied, or have the ability to satisfy, the terms of the loan
6 that apparently led to the trustee's sale of the Shapleigh Court
7 property. Accordingly, Plaintiffs' request to quiet title is
8 dismissed with leave to amend.

9 IV. Breach of Fiduciary Duty

10 Absent special circumstances, a loan transaction, like all
11 ordinary banking transactions, does not establish a fiduciary
12 relationship between the borrower and lender. Oaks Mgmt. Corp. v.
13 Superior Court, 145 Cal. App. 4th 453, 466 (2006); see also Price
14 v. Wells Fargo Bank, 213 Cal. App. 3d 465, 476 (1989) ("A debt is
15 not a trust and there is not a fiduciary relation between debtor
16 and creditor as such. The same principle should apply with even
17 greater clarity to the relationship between a bank and its loan
18 customers."). Generally, a financial institution does not owe a
19 borrower a duty of care. Nymark v. Heart Fed. Sav. & Loan Ass'n,
20 213 Cal. App. 3d 1089, 1095-96 (1991).

21 Plaintiffs did not respond to U.S. Bank's argument that they
22 have not alleged facts suggesting that it was their fiduciary.
23 Instead, in their opposition, Plaintiffs complain about their
24 lender's role in their original loan transaction. However, as
25 already noted, Plaintiffs have not alleged that U.S. Bank was their
26 lender. Even if it were, Plaintiffs do not allege facts to suggest
27 that there were special circumstances surrounding the loan

1 transaction that gave rise to a fiduciary relationship.

2 U.S. Bank asserts that Plaintiffs' claim is time-barred.
3 However, it is not clear what conduct Plaintiffs believe breached a
4 fiduciary duty. Thus, it is premature to conclude that this claim
5 is time-barred.

6 Accordingly, Plaintiffs' breach of fiduciary duty claim is
7 dismissed. Plaintiffs are granted leave to amend to allege facts
8 suggesting that U.S. Bank was their fiduciary and that it breached
9 duties related to that role.

10 V. Negligence and Negligence Per Se

11 Plaintiffs plead claims for negligence and "negligence per
12 se."

13 To state a claim for negligence, a plaintiff must allege
14 (1) the defendant's legal duty of care to the plaintiff; (2) the
15 defendant's breach of duty; (3) injury to the plaintiff as a result
16 of the breach; and (4) damage to the plaintiff. Hoyem v. Manhattan
17 Beach City Sch. Dist., 22 Cal. 3d 508, 513 (1978). "The legal duty
18 of care may be of two general types: (a) the duty of a person to
19 use ordinary care in activities from which harm might reasonably be
20 anticipated, or (b) an affirmative duty where the person occupies a
21 particular relationship to others." McGettigan v. Bay Area Rapid
22 Transit Dist., 57 Cal. App. 4th 1011, 1016-17 (1997). "[A]s a
23 general rule, a financial institution owes no duty of care to a
24 borrower when the institution's involvement in the loan transaction
25 does not exceed the scope of its conventional role as a mere lender
26 of money." Nymark, 231 Cal. App. 3d at 1095; see also Kinner v.
27 World Sav. & Loan Ass'n, 57 Cal. App. 3d 724, 732 (1976) (holding

1 no duty of care owed by lender to borrower to ensure adequacy of
 2 construction loan); Wagner v. Benson, 101 Cal. App. 3d 27, 35
 3 (1980) (finding no duty owed by lender to borrower where lender is
 4 not involved extensively in borrower's business). Courts,
 5 including this one, have applied this rule to loan servicers. See,
 6 e.g., Hendrickson v. Popular Mortg. Servicing, Inc., 2009 WL
 7 1455491, *7 (N.D. Cal.); Marks v. Ocwen Loan Servicing, 2008 WL
 8 344210, *6 (N.D. Cal.).

9 Negligence per se is not a cause of action, but rather an
 10 evidentiary presumption that a party failed to exercise due care if

11 (1) He violated a statute, ordinance, or
 12 regulation of a public entity;

13 (2) The violation proximately caused death or
 14 injury to person or property;

15 (3) The death or injury resulted from an
 16 occurrence of the nature which the statute,
 ordinance, or regulation was designed to
 prevent; and

17 (4) The person suffering the death or the
 18 injury to his person or property was one of the
 19 class of persons for whose protection the
 statute, ordinance, or regulation was adopted.

20 Cal. Evid. Code § 669.

21 Plaintiffs allege that U.S. Bank "owed a general duty of care
 22 . . . to perform due diligence as to" their loan and to avoid
 23 marketing loans they knew that borrowers could not afford. Compl.
 24 28. In their opposition, they also assert that U.S. Bank also had
 25 a duty of care under TILA, RESPA, the Home Ownership and Equity
 26 Protection Act (HOEPA) and related regulations. The allegations
 27 supporting their negligence claim focus on the original loan

1 agreement, which they executed in April 2007.

2 Plaintiffs do not allege that U.S. Bank was involved in the
3 original loan transaction. Even if they did, a "lender 'owes no
4 duty of care to the [borrowers] in approving their loan.'" Perlas
5 v. GMAC Mortg., LLC, 187 Cal. App. 4th 429, 436 (2010) (quoting
6 Wagner, 101 Cal. App. 3d at 35)). This is because a "lender is
7 under no duty to determine the borrower's ability to repay the
8 loan." Perlas, 187 Cal. App. 4th at 436 (citation and internal
9 quotation marks omitted). Plaintiffs did not respond to this
10 argument. Thus, to the extent that Plaintiffs' claim is based on
11 offering them a loan they could not afford, it is not cognizable
12 under California law.

13 Further, U.S. Bank notes that Plaintiffs' negligence claim was
14 not filed within two years of the date of the alleged injury, as
15 required by the statute of limitations. Cal. Civ. Proc. Code
16 § 335.1. Plaintiffs did not respond directly to this argument, but
17 instead invoke the doctrine of equitable estoppel.
18 However, as noted above, Plaintiffs fail to plead that U.S. Bank
19 engaged in any fraud that precluded them from filing suit. Thus,
20 application of the doctrine is not warranted.

21 Plaintiffs have not stated a claim for negligence and are not
22 entitled to a presumption of negligence per se. Further, their
23 negligence claim appears to be time-barred. Accordingly, their
24 negligence claim is dismissed. Plaintiffs are granted leave to
25 amend to plead facts that support a negligence claim that is not
26 barred by the two-year statute of limitations. To the extent that
27 their negligence claim is based on the marketing of loans they
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1 could not afford, it is dismissed with prejudice.

2 VI. Fraud

3 In this cause of action, Plaintiffs allege that unnamed
4 "Agents" made misrepresentations with the intention of inducing
5 Plaintiffs to act in reliance on them.

6 All of Plaintiffs' allegations of fraud address the loan
7 origination and closing procedures. However, they do not allege
8 that U.S. Bank was involved in these transactions. Also,
9 Plaintiffs' allegations lack the specificity required under Federal
10 Rule of Civil Procedure 9(b) for all claims sounding in fraud. See
11 Fed. R. Civ. P. 9(b) ("In all averments of fraud or mistake, the
12 circumstances constituting fraud or mistake shall be stated with
13 particularity."); Wool v. Tandem Computers, Inc., 818 F.2d 1433,
14 1439 (9th Cir. 1987) (allegations must include the time, place and
15 nature of the alleged fraudulent activities). Furthermore,
16 Plaintiffs' fraud claim appears to be time-barred. They have not
17 plead facts to suggest that the three-year statute of limitations
18 should not apply. Cal. Civ. Proc. Code § 338(d).

19 Accordingly, U.S. Bank's motion to dismiss this claim is
20 granted. Plaintiffs are granted leave to amend to plead specific
21 facts, including the time, place and nature of U.S. Bank's alleged
22 fraudulent conduct. Further, Plaintiffs must plead facts, if there
23 are any, to suggest that they are entitled to relief from the
24 statute of limitations.

25 VII. Breach of the Covenant of Good Faith and Fair Dealing

26 Under California law, "[t]he prerequisite for any action for
27 breach of the implied covenant of good faith and fair dealing is
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1 the existence of a contractual relationship between the parties,
2 since the covenant is an implied term in the contract." Smith v.
3 City & County of S.F., 225 Cal. App. 3d 38, 49 (1990).

4 Plaintiffs have not alleged that they have any direct
5 contractual relationship with U.S. Bank. In their opposition,
6 Plaintiffs do not address U.S. Bank's argument on this point.
7 Therefore, Plaintiffs' claim for breach of the covenant of good
8 faith and fair dealing is dismissed. They are granted leave to
9 amend to plead the nature of their contract with U.S. Bank, if any,
10 and how it was breached.

11 VII. Truth in Lending Act

12 TILA was enacted "to assure a meaningful disclosure of credit
13 terms so that the consumer will be able to compare more readily the
14 various credit terms available to him and avoid the uninformed use
15 of credit." Yamamoto v. Bank of N.Y., 329 F.3d 1167, 1169 (9th
16 Cir. 2003) (citing 15 U.S.C. § 1601(a)). If required disclosures
17 are not made, the consumer may obtain damages or seek to rescind
18 the loan. Id. at 1170; Martinez v. EMC Mortg. Corp., 2009 WL
19 2043013, *5 (E.D. Cal.).

20 The only parties who can be liable for TILA violations are the
21 original creditor and assignees of that creditor. 15 U.S.C.
22 §§ 1640, 1641; Redic v. Gary H. Watts Realty Co., 762 F.2d 1181,
23 1185 (4th Cir. 1985); Nevis v. Wells Fargo Bank, 2007 WL 2601213,
24 *2 (N.D. Cal.). Servicers of consumer obligations are not treated
25 as assignees for purposes of imposing liability unless they are
26 also the owner of the obligation. 15 U.S.C. § 1641(f); Chow v.
27 Aegis Mortg. Corp., 286 F. Supp. 2d 956, 959 (N.D. Ill. 2003).

1 Here, Plaintiffs have not plead that U.S. Bank was its
2 creditor or an assignee of its creditor. Further, Plaintiffs have
3 not identified which disclosures, required by TILA, U.S. Bank
4 failed to provide.

5 Moreover, U.S. Bank cannot be liable for damages because the
6 one-year statute of limitations has expired. 15 U.S.C. § 1640(e).
7 Plaintiffs executed the loan agreement in April 2007 but filed
8 their lawsuit in September 2010. Thus, the TILA claim for damages
9 is untimely. Their attempt to seek equitable relief from the
10 statute of limitations fails for the reasons stated above.

11 Plaintiffs' TILA claim for rescission fails because the
12 Shapleigh Court property has already been sold. See Beach v. Ocwen
13 Fed. Bank, 523 U.S. 410, 411 (1998) (stating that 15 U.S.C.
14 § 1635(f) provides that right of rescission expires three years
15 after loan closes or upon the sale of secured property, whichever
16 is earlier). Furthermore, Plaintiffs have not alleged the present
17 ability to tender amounts owed under the loan. Courts have
18 discretion to condition rescission under TILA on tender by the
19 borrower of funds received from the lender. Yamamoto, 329 F.3d at
20 1171; Martinez v. EMC Mortg. Corp., 2009 WL 2043013 *6 (E.D. Cal.)
21 (noting "absent meaningful tender, TILA rescission is an empty
22 remedy, not capable of being granted"). Plaintiffs do not respond
23 to U.S. Bank's argument that they must tender amounts owed under
24 the loan.

25 For all of the reasons above, the Court grants U.S. Bank's
26 motion to dismiss the TILA claim. Plaintiffs are granted leave to
27 amend to plead facts showing that U.S. Bank is a proper TILA

1 defendant, that it violated TILA and that they are entitled to
2 equitable relief from the one-year statute of limitations for
3 damages. Plaintiffs' request for rescission under TILA is
4 dismissed with prejudice.

5 VIII. Intentional Infliction of Emotional Distress

6 A claim of intentional infliction of emotional distress
7 requires a plaintiff to plead: "(1) extreme and outrageous conduct
8 by the defendant with the intention of causing, or reckless
9 disregard of the probability of causing, emotional distress;
10 (2) the plaintiff's suffering severe or extreme emotional distress;
11 and (3) actual and proximate causation of the emotional distress by
12 the defendant's outrageous conduct." Christensen v. Superior
13 Court, 54 Cal. 3d 868, 903 (1991). The conduct must be so extreme
14 as to "exceed all bounds of that usually tolerated in a civilized
15 community," id., and the distress so severe "that no reasonable man
16 in a civilized society should be expected to endure it," Fletcher
17 v. W. Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 397 (1970).

18 Plaintiffs allege that the action of U.S. Bank, "driven as it
19 was by profit at the expense of increasingly highly leveraged and
20 vulnerable consumers who placed their faith and trust in the
21 superior knowledge and position of Defendants," constituted extreme
22 and outrageous conduct. Compl. 32. Plaintiffs' complaint,
23 however, fails to allege sufficient facts showing extreme and
24 outrageous conduct. Thus, Plaintiffs do not state a claim for
25 intentional infliction of emotional distress against U.S. Bank.

26 IX. Preliminary Injunction

27 Plaintiffs ask the Court to enjoin U.S. Bank from foreclosing
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1 on the Shapleigh Court property. However, as noted above, the
2 property was sold at a trustee's sale in September 2010, before
3 Plaintiffs' lawsuit was filed. Accordingly, Plaintiffs' request
4 for a preliminary injunction is denied as moot.

5 CONCLUSION

6 For the foregoing reasons, U.S. Bank's motion to dismiss is
7 GRANTED. (Docket No. 6.) The Court's rulings are summarized as
8 follows:

- 9 1. Any challenge to the September 2010 foreclosure sale
10 fails because Plaintiffs have not plead tender of the
11 amounts owed on their loan or the ability to offer
12 tender. Plaintiffs are granted leave to amend to cure
13 this deficiency.
- 14 2. Plaintiffs' RESPA claim is dismissed with leave to amend
15 to plead, if they can truthfully do so, that U.S. Bank
16 was their lender, that it committed RESPA violations
17 within the three-year statute of limitations and that
18 they suffered damages as a result. If Plaintiffs seek
19 relief for conduct outside of the limitations period,
20 they must plead facts suggesting that they are entitled
21 to equitable relief from the statute of limitations.
- 22 3. Plaintiffs' request that title be quieted in their favor
23 is dismissed. Plaintiffs are granted leave to amend to
24 allege that they have a colorable claim to the Shapleigh
25 Court property.
- 26 4. Plaintiffs' claim for breach of fiduciary duty is
27 dismissed. They are granted leave to amend to allege
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1 facts demonstrating that they had a fiduciary
2 relationship with U.S. Bank and that it violated duties
3 related to that role.

4 5. Plaintiffs' claim for negligence fails, they are not
5 entitled to avail themselves of the evidentiary
6 presumption of negligence per se, and their negligence
7 claim appears to be time-barred. They are granted leave
8 to amend to plead facts that suggest that U.S. Bank
9 engaged in negligent conduct. If Plaintiffs seek relief
10 for conduct that occurred outside of the limitations
11 period, they must plead facts suggesting that they are
12 entitled to equitable relief from the statute of
13 limitations.

14 6. Plaintiffs' fraud claim fails because they have not
15 alleged, with sufficient specificity, that U.S. Bank
16 engaged in any fraudulent conduct. They are granted
17 leave to amend to plead specific facts concerning the
18 time, place and nature of U.S. Bank's alleged fraud. If
19 Plaintiffs seek relief for conduct that occurred outside
20 of the limitations period, they must plead facts
21 suggesting that they are entitled to equitable relief
22 from the statute of limitations.

23 7. Plaintiffs' claim for breach of the covenant of good
24 faith and fair dealing is dismissed. They are granted
25 leave to amend to plead the nature of their contract with
26 U.S. Bank, if any, and how it was breached. If
27 Plaintiffs seek relief for conduct that occurred outside
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1 of the limitations period, they must plead facts
2 suggesting that they are entitled to equitable relief
3 from the statute of limitations.

4 8. Plaintiffs' TILA claim for damages is dismissed with
5 leave to amend to allege facts demonstrating that U.S.
6 Bank was its lender or an assignee of its lender, that
7 U.S. Bank violated TILA and that they are entitled to
8 equitable relief from the one-year statute of
9 limitations. Plaintiffs' TILA claim for rescission is
10 dismissed with prejudice as barred by the foreclosure
11 sale of the Shapleigh Court property.

12 9. Plaintiffs' claim for intentional infliction of emotional
13 distress is dismissed with leave to amend to plead the
14 nature of the extreme and outrageous conduct committed by
15 U.S. Bank.

16 10. Plaintiffs' request that the Court enjoin the sale of the
17 Shapleigh Court property is denied as moot.

18 Plaintiffs are granted leave to amend their complaint so long
19 as they can truthfully cure the deficiencies noted above.

20 Plaintiffs shall file their amended complaint fourteen days from
21 the date of this Order. Plaintiffs' failure to file a complaint
22 within fourteen days will result in the dismissal of their action
23 for failure to prosecute.

24 If Plaintiffs file an amended complaint, U.S. Bank shall
25 answer or file a motion to dismiss twenty-one days thereafter. If
26 U.S. Bank moves to dismiss, Plaintiffs' opposition shall be due
27 fourteen days after the motion is filed. Any reply shall be due
28

1 seven days after that. The motion will be taken under submission
2 on the papers.

3 IT IS SO ORDERED.

4
5 Dated: 8/22/2011



CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JOSE M. BERNARDO et al,

Case Number: CV10-04785 CW

Plaintiff,

CERTIFICATE OF SERVICE

v.

U.S. BANK NATIONAL ASSOCIATION et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 22, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Araceli B. Bernardo
5015 Shapleigh Ct
Dublin, CA 94568

Jose M. Bernardo
5015 Shapleigh Ct
Dublin, CA 94568

Dated: August 22, 2011

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk

United States District Court
For the Northern District of California